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FILED
JUN 9 - 2005
OFFICE OF THE CLERK

No. 04-165

IN THE

Supreme Court of the United States

COMSTOCK RESOURCES, INC., ET AL.,
Petitioners,

v.

DON C. KENNARD AND HARROLD E. WRIGHT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENTS IN OPPOSITION

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June 9, 2005

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As the government's brief makes clear (at 14), this case involves the application of a "totality of the circumstances" standard to a somewhat unusual set of facts. The Tenth Circuit has subsequently applied the decision below in a case *denying* a relator status as an original source – a case Comstock ignores notwithstanding the Solicitor General's discussion (at 11 n.3). It is therefore clear that Comstock seeks to stitch together a circuit "conflict" based not on any meaningful difference in legal *standards*, but rather on the application of a contextually based test that leads to different *results*, depending on the circumstances. Given the strong interest of the government in the proper administration of the False Claims Act ("FCA"), its position in this case recommending a denial of certiorari is entitled to special respect.

1. Comstock leaves to the end of its supplemental brief its arguments responding to the government's apt observation that this case provides an unsuitable vehicle for this Court's consideration of petitioner's request that the Court further delineate the legal standard for determining an "original source." Yet those vehicle problems make this a particularly ill-suited case for this Court to delve into the jurisdictional issues surrounding original sources in FCA cases.

First, the interlocutory posture of the case counsels against further review at this time. Save for the unusual posture that the district court here erred in denying respondents status as original sources, which the Tenth Circuit properly reversed, in the ordinary course a lower court's judgment that respondents are original sources would not be subject to direct appeal. SG Br. 9. Absent the extraordinary showing needed for an interlocutory appeal, a defendant such as Comstock would have to wait until after the case has been decided to appeal that issue (as it would any other issue decided in an interlocutory phase of the case).

Second, and more importantly, Comstock asserts erroneously that the "alleged fraud . . . *had already been publicly disclosed* in a civil complaint filed in federal court." Pet. Supp. Br. 1. Nowhere does Comstock acknowledge that this case presents the highly unusual fact that the proper relators here – respondents Kennard and Wright – had their information stolen from them and that it was submitted in the civil complaint that Comstock contends was the public disclosure. *See* SG Br. 4-5. Comstock thus asks this Court to sanction the most egregious form of "gotcha" under the FCA: relators who themselves are defrauded by a wrongdoer's filing of *their* complaint allegations are denied status as original sources because their very own information was a "public disclosure." For this Court even to decide whether a relator in that position meets the legal standard for an "original source," it must first rule against respondents and hold that the filing of

the stolen complaint constituted a "public disclosure." As the Solicitor General points out, the government has taken the position generally that civil complaints to which the United States is not a party should not be considered "public disclosures." SG Br. 19 n.5. Before it could reach the question Comstock posits, therefore, this Court would have to address whether the fraudulently filed complaint was a public disclosure.[1] Comstock has asserted no conflict on that question.

Third, for this Court to rule against respondents, it also would have to determine that the information underlying their complaint was "based upon" the complaint filed the day before they filed theirs. As a matter of common sense, the allegations in respondents' complaint were not "based upon" the prior-filed complaint. Rather, that complaint stole *their* complaint allegations. As the government notes (at 19 n.5), for this Court to grant Comstock's petition, it necessarily would have to wade into a doctrinal thicket that has arisen over the meaning of "based upon." That is because respondents would be entitled to argue that their complaint was not "based upon" the complaint stolen from them by their renegade attorney. Yet Comstock's petition has not raised any issue concerning the construction of "based upon" in this case.

2. As the government notes, the Tenth Circuit did not announce a legal rule that departs from the test uniformly applied by the other circuits. After the decision below, the Tenth Circuit handed down *United States ex rel. Grynberg v. Praxair, Inc.*, 389 F.3d 1038 (10th Cir. 2004), *petition for cert. pending*, No. 04-1363 (filed Apr. 4, 2005). That

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[1] The antecedent nature of the public disclosure question derives directly from the text of the FCA, which provides that a court shall not have jurisdiction "over an action under this section based upon the public disclosure of allegations . . . unless . . . the person bringing the action is an original source of the information." 31 U.S.C. § 3730(e)(4)(A). If there is no "public disclosure" of the allegations, the court would have no reason to determine whether the "person bringing the action is an original source."

case "confirms the fact-specific character of the court's ruling in the instant case." SG Br. 11 n.3. Importantly, the Tenth Circuit in *Grynberg* made clear that it had not formulated any new legal test for determining whether a source was an "original source." Rather, the court simply applied a heavily fact-dependent contextual approach in ruling that Wright and Kennard are original sources in the decision below, and that Grynberg was *not* an original source in his case. *See* 389 F.3d at 1053-54. Comstock completely ignores *Grynberg* in its supplemental brief. But that case demonstrates that the rule applied by the Tenth Circuit simply reflects a settled "totality of the circumstances" legal standard applied to the facts presented by respondents Wright and Kennard. If the facts warrant a finding of direct knowledge to be original sources, as in respondents' case, the Tenth Circuit will so find; if the facts do not warrant such a finding, as in *Grynberg*, the Tenth Circuit will reject a relator's claim to be an original source. Those differences in result, however, no more create an intra-circuit split than they do an inter-circuit conflict.

What Comstock never comes to grips with is that its narrow vision of what constitutes "direct" knowledge – *i.e.*, that a relator "observed the fraud . . . with his own eyes" (Pet. 26) – is untethered to the text or to common sense. The FCA does not say *what* direct knowledge a relator must possess. As the cases demonstrate, a relator's direct knowledge that leads to the discovery of fraud can come in a variety of forms. The government rightly construes the statute in observing that the FCA "provides no formula for determining *how much* of the relevant information the relator must perceived 'directly' in order to qualify as an 'original source.'" SG Br. 13.

3. In response to the government's brief, Comstock's continuing effort to assert a circuit conflict has clearly run out of steam. Comstock abandons most of the cases it alleges to be in conflict and focuses on just three: *United States ex rel. Barth v. Ridgedale Electric, Inc.*, 44 F.3d 699

(8th Cir. 1995); *United States ex rel. Reagan v. East Texas Medical Center Regional Healthcare System*, 384 F.3d 168 (5th Cir. 2004); and *United States ex rel. Devlin v. California*, 84 F.3d 358 (9th Cir. 1996). But, as the government notes, those cases do not create a conflict with the Tenth Circuit – indeed, after *Grynberg*, the absence of a circuit conflict is even clearer.

In *Barth*, the Eighth Circuit rejected a relator's contention of being an "original source" on the ground that the relator lacked direct knowledge of the alleged fraud. 44 F.3d at 703. Comstock mischaracterizes *Barth*. The putative relator there, Priem, was denied status as an "original source" because his role for the union caused him to gather information from others who themselves had "direct knowledge of alleged fraud." *Id.* The Eighth Circuit merely held – consistent with the legal standard applied by the Tenth Circuit below and in *Grynberg* – that the knowledge an original source has of the fraud must be direct; merely reporting information gathered from other persons with direct knowledge is insufficient. Here, no one reported to Kennard and Wright the fraud – they ferreted it out themselves. Thus, *Barth* is readily distinguishable. There is no basis for thinking that a conflict exists between it and the decision below.

The Ninth Circuit's decision in *Devlin* is to the same effect. The putative relator obtained the information of alleged fraud secondhand from another person who did have "firsthand knowledge." 84 F.3d at 361. In saying that respondents Wright and Kennard "could not survive the *Devlin* analysis," Pet. Supp. Br. 8, Comstock simply distorts the firsthand analysis and information that stemmed directly from respondents' efforts. Again, *Devlin* did not present a legal standard any different from the one applied by the Tenth Circuit; its facts merely differed from those adduced below.

Finally, Comstock's effort (at 7) to establish a conflict with *Reagan* has no merit. In language on all fours with the legal standard applied by the Tenth Circuit below and

in *Grynberg*, the Fifth Circuit in *Reagan* said that "[t]he plain meaning of the term 'direct' requires 'knowledge derived from the source without interruption or gained by the relator's own efforts rather than learned second-hand through the efforts of others.'" 384 F.3d at 177 (quoting *United States ex rel. Laird v. Lockheed Martin Eng'g & Sci. Servs. Co.*, 336 F.3d 346, 355 (5th Cir. 2003)). The court then applied that standard to hold that a relator who obtained her knowledge virtually entirely from public records was not an original source. *Id.* at 178-79. In *Reagan*, that consisted of information that "the public already knew." *Id.* at 179. Here, as the government acknowledges, respondents "did not rely on reports of others about alleged fraud." SG Br. 15. Rather, the information from their investigation "was the product of their own investigation from a variety of sources." *Id.*

In short, although Comstock seeks to take the government to task for not pointing to a single case from another circuit that supports the decision below, Pet. Supp. Br. 5, the government is completely correct to note the absence of any circuit conflict on the articulation of a governing legal standard for defining an "original source." What makes the result different here is that the facts support the Tenth Circuit's conclusion that respondents are original sources because they have direct knowledge of Comstock's fraud. Comstock simply refuses to acknowledge that the facts here are materially different from those in which other courts of appeals – all applying a commonly followed contextual standard – have rejected a particular relator's status as an "original source."

4. Finally, the policy arguments advanced by Comstock have no merit. First, Comstock argues that "the absence of a clear rule has created enormous practical difficulties for private companies that do business with the government." Pet. Supp. Br. 8. The assumption behind Comstock's statement is extremely attenuated – at best. Companies do not decide whether to deal honestly with the government or to commit fraud based on whether

the whistleblowers who may uncover their fraudulent schemes will be deemed "original sources." Under Comstock's strained view, a more stringent test for original sources – one based on "knowledge . . . obtained by direct observation of or participation in the alleged fraud" (Pet. 23) – would clearly hinder the government's recoveries for fraud. It would weed out those, like respondents, who carefully piece together information using their personal and direct knowledge and ferret out fraud that costs the United States government, as trustee for the Alabama-Coushatta Indian Tribe, millions of dollars in unpaid royalties. Because, as the government notes (at 12-13), such a result is contrary to the purposes and aims of the FCA, Comstock's policy argument is unpersuasive.

Second, Comstock contends that the government has an incentive to encourage *qui tam* suits and therefore seeks a broad standard for determining an "original source." Pet. Supp. Br. 1. That is incorrect. The government has an incentive to apply an interpretation true to Congress's intent. The government does not benefit from the presence in its FCA suits of relators that do not add original and direct information that advances the government's investigation. Such relators add no value and simply impede efficient litigation by the government. Moreover, the existence of relators in FCA suits denies the government a substantial share of any recovery it receives from wrongdoers. *See* 31 U.S.C. § 3730(d) (if government takes over action brought by *qui tam* relator, that relator shall receive between 15 and 25 percent of the proceeds). If a putative relator does not meet the statutory standard, the government may keep the entire recovery from an FCA defendant for itself. Thus, the government has a clear financial incentive to permit relator status only to the extent authorized by Congress.

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For the foregoing reasons and those stated in the brief in opposition, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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